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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

Robert Cuevas

Claim No. G581280

Proposed Decision

(Penal Code § 4900)

Introduction

A telephonic hearing on this claim was held on November 9, 2010, in Sacramento, California, by Kevin Kwong, Hearing Officer, California Victim Compensation and Government Claims Board. The claimant, Robert Cuevas, appeared at the hearing and was represented by attorneys Wayne Tobin and Ya-EI Trock. The California Attorney General's Office was represented by Clara Levers, Deputy Attorney General (AG), and has opined that Cuevas has met his burden of proving his innocence.

As explained below, Cuevas has met the statutory requirements to receive compensation under Penal Code section 4900 because he has proven by a preponderance of the evidence that he did not commit the crimes with which he was charged. Cuevas was convicted on December 9, 2003, and was released from prison on September 5, 2008, thus he spent 1,627 days in prison and is eligible for \$162,700.00 in compensation.

Procedural Background

On May 14, 2003, three men entered a Rite Aid pharmacy store in Los Angeles and stole small items by placing them in their pockets. During the course of the robbery one of the suspects

1 pulled out a gun and pointed it at store security officers before escaping. On May 16, 2003, Los
2 Angeles Police Officer Richard Gadsby, who was familiar with Cuevas from previous encounters,
3 believed that Cuevas could have been one of the robbers based on viewing the surveillance
4 videotape of the robbery from store security cameras. Cuevas was arrested a few months later after
5 being identified by Rite Aid employees as the suspect in photo lineups.

6 On December 1, 2003, a jury trial commenced in which Cuevas was convicted of robbery with
7 the use of a firearm. He was sentenced to 12 years in prison. Multiple appeals and petitions were
8 denied by the California Court of Appeals, the California Supreme Court, and the United States
9 District Court.

10 In February 2007, the case was referred to the Los Angeles Post Conviction Assistance¹
11 Center. This was mainly because enhanced technology allowed a clearer look at the surveillance
12 videotape of the robbery. The Los Angeles District Attorney's Office viewed the enhanced footage
13 along with pictures of Cuevas from around the time of the robbery and no longer believed that
14 Cuevas was the perpetrator. On September 5, 2008, the District Attorney's Office conceded the
15 factual innocence of Cuevas, joined in the petition for writ of habeas corpus, and dismissed the
16 charges. Cuevas was immediately released from prison. On December 1, 2008, Cuevas received an
17 order of factual innocence pursuant to Penal Code section 851.8(c).

18 **Summary of Evidence**

19 **I. Facts and Evidence at the Criminal Proceeding**

20 On May 14, 2003, three men entered a Los Angeles Rite Aid Pharmacy store. One of these
21 three men was wearing a Los Angeles Dodgers baseball hat, glasses that had a tint on the lenses, he
22 had a dark and thick mustache, and a strip of hair below his lip. These three men stole gift bags and
23 teeth whitening strips by placing them in their pants pockets. Rite Aid's security team, called Loss
24 Prevention (LP), observed the suspects committing the robbery from surveillance video cameras.
25 Two LP members, John Romero and Juan Luken, went outside to the front of the store to stop the
26 suspects as soon as they left the store. As the suspects exited, they were approached by Romero,
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28 ¹ According to its website, the Post Conviction Assistance Center is a public law firm funded by Los
29 Angeles County and is appointed cases to review by the court.

1 Luken, and other LP members. The suspect with the Dodgers hat pulled a gun from his pants and
2 pointed it at the LP members. He then said "back the fuck up," and "fuck L.P." The suspects then
3 fled.

4 Los Angeles Police Officer Richard Gadsby was familiar with Cuevas from the neighborhood
5 where Gadsby worked. Gadsby testified that he had spoken with Cuevas on at least 10 to 20 prior
6 occasions that were either detentions or casual encounters. Cuevas had one prior felony conviction
7 of receiving stolen property. After watching the surveillance videotape of the robbery and randomly
8 seeing Cuevas a few days later, Gadsby believed that Cuevas resembled the suspect with the
9 Dodgers hat. Gadsby then created a photo lineup for Romero and Luken and they both identified
10 Cuevas as the perpetrator. On July 23, 2003, Cuevas was arrested and he denied any involvement
11 in the robbery. He pointed out differences in appearance between himself and the suspect. A search
12 warrant of Cuevas' house did not find any of the clothing worn on the day of the robbery, the weapon,
13 or any of the stolen items.

14 At trial, both Romero and Luken testified that Cuevas was the person with the Dodgers hat
15 who pointed a gun at them. They also testified that they took their time in identifying Cuevas in the
16 photo lineup and that Cuevas looked like the robber. Gadsby testified that when he saw Cuevas a
17 few days after the robbery, Cuevas had a darker mustache than usual and he had a "French tickler"
18 or hair below his lip. Cuevas' defense consisted of expert witnesses who testified that Romero and
19 Luken only briefly saw the suspect in-person since most of their viewing was on a television watching
20 the surveillance cameras, and that when they briefly saw the suspect he was holding a gun at them
21 which can lead to false identifications. The jury convicted Cuevas of robbery and using a firearm after
22 determining that he was the person in the surveillance videotape wearing the Dodgers hat.

23 After numerous failed appeals and petitions, a copy of the surveillance videotape was brought
24 by Cuevas' attorneys to forensic analyst Gregg Stutchman in 2008. Stutchman is a former police
25 officer who now has his own forensic laboratory and was on the Los Angeles County Superior Court
26 Panel of Experts at this time. Using technology that did not exist in 2003, Stutchman was able to
27 enhance the surveillance videotape and obtain a cleaner picture of the perpetrator in the Dodgers
28 hat. Comparing this enhanced picture with pictures taken of Cuevas near the time of the crime in
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1 2003, Stutchman concluded that the perpetrator had a rounder face and shorter chin than Cuevas.
2 Additionally, the perpetrator's chin is more receding while Cuevas' chin was somewhat protruding.
3 Finally, there is no picture of Cuveas ever having a lip beard while the perpetrator clearly has hair
4 under his lip.

5 A hearing on a petition for a writ of habeas corpus was held on September 5, 2008. The Los
6 Angeles County District Attorney's Office conceded the petition and dismissed all charges against
7 Cuevas. It stated to the Court "we have an enhanced videotape that...was enhanced by our photo
8 lab, and it's clear that Mr. Cuevas was not the man wielding the gun in the Rite Aid store." The Court
9 also stated that it did see some discrepancies when looking at the enhanced photos and the photos
10 of Cuevas. The petition for habeas corpus was granted and Cuevas was immediately released from
11 prison. On December 1, 2008, Cuevas received a finding of factual innocence.

12 **II. Evidence and Arguments Presented at the 4900 Hearing²**

13 Cuevas testified under oath at the 4900 hearing and denied committing the robbery. He
14 stated that at the time the robbery occurred he was employed by Kathleen Farrell, who throughout the
15 criminal proceedings was a staunch supporter of his innocence. Cuevas had known Farrell for
16 approximately five years before the robbery occurred and he worked as her handyman. During the
17 period around the time of the robbery, he was working on a project on her home. Cuevas, who lived
18 with his parents at this time, typically worked from 8:00 a.m. until 5:00 p.m. and made around \$400.00
19 to \$500.00 a week. Farrell had also given Cuevas cash advances in the past. Often times he would
20 work by himself or unsupervised and Farrell stated in a prior declaration that he was trustworthy
21 enough to be alone in the house.

22 Cuevas testified that he had no prior record of any violent offense. He stated that he never
23 has had any hair under his lip or a "French tickler," and that all the 11 photographs of himself
24 submitted as exhibits were taken around the time of the robbery. Finally, he stated that he did not
25 own any of the clothes worn by the perpetrator, that he did not own a Dodgers hat, and that he did not
26 even like the Dodgers.

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² Numerous photographs of the perpetrator in the Dodgers hat, the enhanced surveillance video of the robbery, and pictures of Cuevas from around the time of the robbery were submitted as evidence.

1 Cuevas also made the following arguments at the hearing:

- 2 - Cuevas had a steady job at the time of the crime and if he needed extra money he could
3 ask Farrell for a cash advance. Thus, there was no financial motive for Cuevas to steal
4 gift bags and teeth whitening strips.
- 5 - No evidence was found linking Cuevas to the robbery such as the stolen items, the
6 weapon, or any of the clothes worn by the perpetrator.
- 7 - Although Cuevas never established an alibi, he was arrested and interviewed by the police
8 over two months after the crime occurred making it difficult for him to remember exactly
9 where he was at the time of the robbery. Additionally, Cuevas often worked by himself at
10 Farrell's home and Farrell stated that Cuevas was employed by her on the day of the
11 robbery.
- 12 - The facial features of the perpetrator in the Dodgers hat differ than that of Cuevas. The
13 perpetrator has a round face, receding chin, thick mustache, and lip hair. Cuevas has
14 none of these features and has a thin face with a protruding chin.
- 15 - Cuevas received a finding of factual innocence.

16 The AG's office appeared at the hearing but did not cross-examine Cuevas or present any
17 argument in opposition to Cuevas' claim.

18 Findings

19 A preponderance of the evidence supports each of the following findings:

- 20 1. The perpetrator in the Dodgers hat had a round face, receding chin, a thick mustache,
21 and some hair underneath his lip.
- 22 2. At the time of the robbery Cuevas had a thin face with a protruding chin.
- 23 3. The Los Angeles County District Attorney's Office does not believe that Cuevas is the
24 perpetrator.
- 25 4. The forensic expert and habeas court stated that there are differences between the
26 appearance of the perpetrator in the video and Cuevas.

1 **Determination of Issues**

2 **I. Cuevas' Burden of Proof to Obtain Compensation**

3 A person erroneously convicted and imprisoned for a felony may submit a claim to the Board for
4 pecuniary injury sustained as a result of his erroneous conviction and imprisonment.³ Penal Code
5 section 4903 provides that in order to state a successful claim for compensation, the claimant must
6 prove the following by a preponderance of the evidence:⁴

- 7 1. That the crime with which he was charged was either not committed at all, or, if committed,
8 was not committed by him;
- 9 2. That he did not by any act or omission on his part, either intentionally or negligently,
10 contribute to the bringing about of the arrest or conviction for the crime; and
- 11 3. That he sustained a pecuniary injury through his erroneous conviction and imprisonment.

12 If the claimant meets his burden of proof, the Board shall recommend to the legislature that an
13 appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the
14 claimant.⁵ Cuevas claim should be approved because he has shown by a preponderance of the
15 evidence that he did not commit the crime with which he was charged.

16 **II. Cuevas Has Met His Burden of Proving Innocence**

17 Although Romero and Luken identified Cuevas both in the photo lineup and at trial as the
18 perpetrator, their eyewitness identification is not as accurate as the videotape. In watching the
19 enhanced, clearer image from the videotape, the perpetrator in the Dodgers hat has facial features that
20 differ from Cuevas. Most significant is the facial shape of the two men. The perpetrator has a rounder
21 and fatter face, while Cuevas had more of an oval, skinny face based on the pictures submitted of him
22 around the time of the crime. Although Gadsby testified that he saw Cuevas a few days after the
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24 ³ Pen. Code, § 4900.

25 ⁴ *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and*
26 *Government Claims Board* (2000) 152 Cal. App. 4th 1164. Preponderance of the evidence means
27 "evidence that has more convincing force than that opposed to it." (*People v. Miller* (1916) 171 Cal.
649, 652.)

28 ⁵ Pen. Code, § 4904.

1 robbery with hair underneath his lip, Cuevas testified that he never had this style of facial hair and none
2 of the pictures depicted Cuevas with this style of hair.

3 Since the perpetrator was wearing a baseball hat, tinted glasses, and had facial hair both above
4 and below his lip, it is impossible to clearly see his face. Thus, Cuevas cannot be completely
5 disregarded as the person in the Dodgers hat. However, Cuevas has met his burden of proving by a
6 preponderance of the evidence that he is not the person in the Dodgers hat. Both the Los Angeles
7 County District Attorney's Office and the AG do not believe that Cuevas is the perpetrator in the
8 Dodgers hat. Cuevas also received a finding of factual innocence after being released from prison.
9 The forensic expert and habeas court stated that there are discrepancies between the two individuals.
10 These pieces of evidence, plus the difference in facial shape which is apparent to the Hearing Officer,
11 weigh in Cuevas' favor.

12 Cuevas' other arguments establishing innocence are not persuasive. Cuevas argued that he
13 had no financial motive to commit a robbery because he was employed at the time. However,
14 robberies are not only committed by those who are unemployed. Additionally, Cuevas testified that in
15 the past he had received cash advances from Farrell showing that there have been times when he
16 needed money. Cuevas lack of a previous violent crime record does not mean that he did not commit
17 this crime because a firearm was only produced after the perpetrator was caught and it appears from
18 the surveillance video as if the perpetrator wanted to simply slip the items into his pocket and then
19 leave the store without brandishing a weapon. Finally, the fact that no physical evidence was found
20 linking Cuevas is given little weight. Just as Cuevas argued that he could not establish an alibi
21 because he was not questioned and arrested until months after the crime, this delay would also have
22 given him ample time to hide or destroy physical evidence linking him to the crime.

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In the Matter of the Claim of:

Robert Cuevas

Claim No. G581280

Notice of Decision

On, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date:

Tisha Heard
Board Liaison
California Victim Compensation and
Government Claims Board